IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15195 of 2003
with
SPECIAL CIVIL APPLICATION No 4594 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

SAHYOG MAHILA MANDAL& ANOTHER

Versus

STATE OF GUJARAT & OTHERS

Appearance:

1. Special Civil Application No. 15195 of 2003
MR ANAND GROVER Advocate with MR BHUSHAN B OZA
Advocate for Petitioner No. 1
MS MANISHA LAVKUMAR AGP for Respondent No. 1,3-5
RULE SERVED for others

2. Special Civil Application No. 4594 of 2003
MR NM KAPADIA Advocate for Petitioner No. 1
MS MANISHA LAVKUMAR AGP for Respondent No. 1 to 3
MR PARESH UPADHYAY Advocate for Respondent No.4 to 6

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 18/03/2004

ORAL JUDGEMENT

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(Per: HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court:)

1. These two petitions raising common questions seek to challenge the provisions of Sections 7 (1) (b), 14 and 15 of the Immoral Traffic (Prevention) Act, 1956 on the ground that they violate the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India. They also challenge the notification dated 23.2.2000 issued by the Commissioner of Police under the provisions of Section 7 (1) (b) by which the areas within the jurisdiction of Chakla Bazaar Police Station, Surat were notified rendering carrying on prostitution in any premises within those areas as an offence.

Brief facts and pleadings:

2. Special Civil Application No.15195 of 2003 has been filed by a public trust, registered only on 25.1.2002, purporting to be an organization consisting of 214 women in prostitution/sex work as its members at Surat. According to the petitioner-organization, it works along with other non-governmental organizations in the field of HIV/AIDS in Surat and the primary object of the organization is to protect vulnerable population, namely, "women in prostitution/sex work", and to prevent them from infection of sexually transmissible diseases, such as, HIV/AIDS.

2.1 According to the petitioner, the area known as "Chakla Bazaar" in Surat was initially on the outskirts of the city where women in prostitution/sex work were

given homes to live in, outside the main town and they have been working in that area for over 400 years. It is stated that the women living in this area are from all over the country and their clients ranged from labourers

to diamond merchants, textile workers, transport officers, students and middle-class people. It is stated that with the expansion of the city of Surat, the area of Chakla Bazaar became part of the main city. Over the years, schools, temples and mosques came to be built in the area, which is known as the "red light area". It is the allegation of the petitioner that the police taking advantage of such extension of the city limits and buildings of schools, temples and mosques in the area, have used the law to commit atrocities on the women in the area thereby violating their rights. It is alleged that the respondents Nos.4 and 5, i.e. the Deputy Commissioner of Police and the Senior Inspector of Police of Chakla Bazaar Police Station, have been harassing the women in prostitution/sex work by abusing the powers conferred on them under the said Act, the PASA and the Bombay Police Act and have been entering homes of the women without search warrants and arresting them arbitrarily. It is alleged that, on 5.1.2003, the respondents Nos.4 and 5 along with their subordinates entered "Noorjahan" and "Sangeeta" buildings in Chakla Bazaar and damaged the homes of the women living there and beat them up forcing them to leave the place. They arrested about 37 women and 8 men from that area without following the procedure established by law. It is alleged that similar raids were carried on by the respondents Nos.4 and 5 and their subordinates from time

to time on various dates mentioned in paragraphs 9 to 39 of the petition, the last being on 15th April, 2003. It is alleged that women who were in the streets and those who were buying vegetables were also beaten up and placed in police lock-up. One woman even died in police custody. According to the petitioner, lives of women in the area have become traumatic and filled with pain and insecurity. Between 5.1.2003 and 15.4.2003, in all, 584 arrests were made, of which 547 were women and 37 were men. The arrests were made of the women in Chakla Bazaar area without following the procedure established by law. The respondents Nos.4 and 5 and their subordinates took from the women Rs.1,000/- to Rs.1,500/- threatening them that if they did not pay up the amount, they would be imprisoned. The women arrested were not informed under what provisions of law they were arrested and were not produced before Magistrate. Only in a few instances were the women produced before the Magistrate. The women were never communicated the ground of their arrest. It is further alleged that, on 20.7.2003, the respondents Nos.4 and 5 and their subordinates directed the landlords of the places where the women stayed not to allow them to enter their homes. It is stated that the women had paid

the rents to the landlords, but they were informed by the landlords that they were threatened by the respondents Nos.4 and 5 and their subordinates and were told that if they did not prevent these women from entering the premises, the landlords will be detained under the provisions of GPASA. All the women in Chakla Bazaar area are, therefore, on the streets as they are practically rendered homeless. It is stated that the respondents Nos.4 and 5 and their subordinates have got the residents living in the area involved in evicting the women from the Chakla Bazaar area. Since 4.9.2003, the women have been sitting outside the Collector's office at Surat on a "dharna". It is alleged that the respondents Nos.4 and 5 and their subordinates have prevented these women from entering their houses by warning them that they would be arrested if they tried to enter. In para 52 of the petition it is stated that the Government is now planning to rehabilitate the women and their children and to send them to Nari Suraksha Gruh. In a meeting of the Chief Secretary with the women and the police, the Chief Secretary had suggested that the women would be moved to Nari Suraksha Gruh and paid certain fixed amount for about six months. It was also suggested that the children of the women would be taken in a remand home or an orphanage. In para 53 of the petition it is stated that: "...sending the women to the Nari Suraksha Gruh or any such other home for a period of six months is not acceptable to them...." It is also stated that taking the children of such women and keeping them in orphanage or a remand home was also not acceptable and that such a course would be violative of Articles 14 and 21 of the Constitution. It is contended that, if a rehabilitation plan has to be worked out, first a conducive environment has to be built to make the women agreeable to such plan and the police authorities should be directed to stop arresting the women. It is stated that due to police raids and harassment, all such policy measures are on the verge of failure and the intervention programmes will have no impact. It is contended that the women in prostitution/sex work are entitled to right to privacy, and equal protection of law and that prostitution or sex work, which is one of the oldest professions, serves an essential social function. Such women earn their daily bread through sex work which is the only means of their survival. It is submitted that the said Act aims at punishing the trafficker or the abuser and not the women in prostitution or sex work. The women in prostitution/sex work are entitled to the right of privacy which cannot be invaded by anyone even in respect of a woman of easy virtue. It is also stated that under section 14 of the Act, which empowers arrest without

warrant, women were randomly arrested without being disclosed the grounds of their arrest or being shown the order in writing. It is contended that Section 14, to the extent it makes all offences under the said Act deemed to be cognizable offences, was violative of Articles 14 and 21 of the Constitution. It is stated that there could be no reason on the part of the respondents Nos.4 and 5 or their subordinates to believe that such women have committed a crime or that they are likely to commit a crime under the Act and thereby to arrest them without a warrant. As regards the provisions of Section 15 of the Act, it is contended that unguided and arbitrary power is given to police officers to conduct search without warrant. It is also contended that the expression "in respect of a person living in any premises" occurring in Section 15 (1) of the Act is vague and that there is no rational nexus between the procedure providing unguided power to the police to search without warrant and prevention of offences as set out under the Act. It is contended that sub-section (4) of Section 15 of the Act is unconstitutional as adult persons who are not suspected of having committed a crime or in respect of whom no crime is committed can be arbitrarily removed from their homes, for no plausible reason, by the police officer. The provisions of Section 15 are, therefore, assailed on the ground that they violate Articles 14 and 21 of the Constitution. It is contended that the women in prostitution, as citizens, have enforceable fundamental rights under the Constitution and their eviction from their homes depriving them of their livelihood amounted to violation of their right to life under Article 21 of the Constitution. As regards the provisions of Section 7 (1) (b) of the Act, it is contended, by an amendment made in the petition, that it gives unguided power to Commissioner of Police without taking into account relevant factors including the factor that prostitution may have been carried on before schools, temples, mosques may have subsequently come up. It is also contended that principles of natural justice have to be read into Section 7 (1) (b) of the Act, otherwise, it would become unconstitutional on the ground that it violates Articles 14 and 21 of the Constitution. As regards the impugned notification dated 23.2.2000 issued under Section 7 (1) (b) of the Act, it is contended that neither the petitioner nor representatives of the women of the area were heard before issuing the notification and the notification was issued without taking into account the relevant considerations including the fact that Chakla Bazaar has been in existence since prior to the coming up of temple, school and mosque in that area. Besides challenging constitutionality of the

provisions of Sections 7 (1) (b), 14 and 15 of the Act on the grounds of violation of Articles 14, 19 and 21 of the Constitution, a direction is sought on the respondents Nos.4 and 5 and their subordinates for restraining them from preventing the members of the petitioner (the women of Chakla Bazaar) ingress into and egress out of their homes and/or interfering with possession of their homes. A direction is also sought on the respondents to formulate a rehabilitation plan of a permanent nature which does not separate these women from their family members and was finalised after a thorough study and with their participation and consent.

3. Special Civil Application No.4594 of 2003 has been filed by the petitioner, who was working as a prostitute/sex worker in Chakla Bazaar area, for protection of fundamental rights of the petitioner as well as other women who were working as prostitutes/sex workers in the same area. It is stated in the first para of the petition that about 1500 women were working in that area and the petition is filed to stop police atrocities on them. It is stated that the petitioner was professing prostitution along with 1500 other women in Chakla Bazaar area but, since about three months, they had stopped the activities. The petitioner has narrated various instances of arrests of women from that area and alleged that such arrests amounted to harassing the women and the police had committed the offences of criminal trespass punishable under Sections 323, 326 read with Section 506 (2) of the Indian Penal Code. It is alleged that some builders in the nearby colony wanted to construct a commercial complex on the main road at Mirza Sami Road and, at their behest, the police have collected details regarding measurements of "kholis" so that these women can be served with notice to vacate the premises on the ground of carrying on illegal activities. It is alleged that the police even beat one handicapped woman, Rupaben Nepali, who had a miscarriage on the next day. A reference is made to the report prepared by the Centre for Adult Education, Extension & Continuing Education, South Gujarat university, Surat in para 12 of the petition and it is pointed out that the survey showed that 78.5% of women in the red light area of Surat were from outside Gujarat, i.e. from Maharashtra, Rajasthan, Madhya Pradesh, Karnataka, Nepal, Kerala and other places and majority of the women were illiterate. A direction is sought that the respondents should permit the prostitutes of Chakla Bazaar area to move freely and without any restrain or constraint and desist from entering into the rooms of the prostitutes without their prior permission or warrant and not to cause any

harassment to them or arrest them on flimsy grounds. This petition has also been preferred as a public interest litigation.

Affidavits of some prostitutes have been filed in support of the contentions raised in the petition alleging harassment by police and narrating their status of poverty.

4. Affidavits-in-reply have been filed by the respondent authorities in both the petitions and pleadings of both the parties have been relied upon by the counsel for both the sides while arguing the matters together.

4.1 In the affidavit-in-reply dated 1.11.2003 filed in Special Civil Application No.15195 of 2003 by the police inspector of Chakla Bazaar Police Station, the affidavits-in-reply filed in the earlier petition being Special Civil Application No.4594 of 2003 are incorporated by reference, and copies thereof have been annexed at Annexures-R.1 and R.2. It is stated that the notification at Annexure-R.3 was issued on 23.2.2000 under the provisions of Section 7 (1) (b) of the Act prohibiting carrying on or indulging in prostitution in the areas notified thereunder. That notification was brought into effect on 1.3.2000. It is stated that there are various religious places like temples, mosques and dargahs situated near Chakla Bazaar area. There are also educational institutions nearby, like I.P.Mission Girls and Boys High School (1876), Sir J.J.High School (1859), and Anglo-Urdu High School, wherein a large number of students are studying. It is stated that brothels are situated on both the sides of the main road in the Chakla Bazaar area through which persons have to pass by for going to temples, mosques, schools or residences. Such people have to face undue hardships while using the road. It is stated in para 5.2 of the affidavit-in-reply that after issuance of the notification, police authorities have tried to strictly implement the same by registering numerous cases against the women carrying on prostitution as well as the brothels situated in the area, due to which the trade of prostitution in the area has come to a total halt. It is stated that at present there are about 60 to 70 women who are "mausis" who bring in girls from outside to carry on prostitution and who at present are residing in Khajurwadi "jhupadpatti". These women with a view to perpetuate carrying on prostitution in Chakla Bazaar area have been making false allegations against police and are on a token "dharna" in front of the Collector's office since 4.9.2003. It is stated that it

appeared that organizations involved in intervention programmes, with a view to easily achieve their HIV/AIDS control target in the Chakla Bazaar area, are supporting the sex workers. It is asserted that police have not caused any injury, either physical or mental, to any person nor have they caused any damage to any property or violated human rights as alleged in the petition and that the allegations contained in the petitions are baseless and concocted. It is submitted that there cannot be any fundamental right to carry on any illegal activities and the sex workers cannot claim any right of prostitution, especially in the notified area. It is denied that the impugned provisions are violative of Articles 14, 19 and 21 of the Constitution. It is stated in para 5.6 of the petition that pursuant to the notification issued under Section 7 (1) (b) of the Act, action has also been taken against landlords under Section 6 of the Act as well as under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985, whereupon the landlords have on their own got the sex workers vacated from the premises and have informed the police in writing about the same. Some of the possession receipts obtained from the landlords as well as affidavits/applications made by them are annexed at Annexure-R.4 to the affidavit-in-reply. It is pointed out that an order dated 21.9.1994 was issued by the Director General and Inspector General of Police, Gujarat State, Ahmedabad in the exercise of powers under Section 6-A of the Suppression of Immoral Traffic in Women and Girls (Bombay) Rules, 1958 appointing Special Officers under sub-section (1) of Section 13 of the Act, whereby police officers of the ranks specified in Column 1 of the Schedule thereto have been appointed to be the Special Officers. A copy of the said order dated 21.9.1994 is annexed as Annexure-R.5 to the affidavit-in-reply. It is stated that all actions against the sex workers were taken in accordance with law and, after the arrests were made, they were produced before Judicial Magistrate, First Class. It is denied that officers and subordinates of the respondents Nos.4 and 5 took Rs.1,000/- to Rs.1,500/- from the women or committed atrocities on the women. It is denied that the women were physically hit or tortured by the law enforcement agencies. It is contended that the averments made in the petitions are false and not borne out from the police record pertaining to raids. It is stated that all the 244 women and 26 men arrested during the period in question, were produced before the Judicial Magistrate, First Class within the prescribed time and that these arrests were made in the exercise of the powers of the Special Police Officers conferred on them by Order dated 21.9.1994. It is stated

that when the accused were produced before the Court, none of them made any allegations of the nature which are sought to be made in the petition against the concerned police authorities. It is stated that the raids were carried out in presence of either a woman Assistant Sub-Inspector, a woman Police Constable or a woman Head Constable, which fact was recorded in the panchnamas made in all the cases. Even after 15.4.2003, i.e. after the period referred to in the petition, during 3.5.2003 and 10.8.2003, 15 offences were registered under the Act in respect of the illegal activity of prostitution in the Chakla Bazaar area and 138 women and 14 men were arrested in connection with those offences. They were also produced before the concerned Court within the prescribed time. Even they had not made any allegations against the police authorities before the Court. A statement of such cases is annexed as Annexure-R.7 to the reply. It is denied that the respondents Nos.4 and 5 or their subordinates took any amount from the women under threat of arrest. It is also denied that, on 20.7.2003 the respondents Nos.4 and 5 directed the landlords of the places where the women stayed not to allow them to enter their homes or that any threats were given to them. It is denied that the women are living on the streets or footpaths. It is stated that these women are residing in Khajurwadi "jhupadpatti", behind Chakla Bazaar area, of whom majority are "mausis" and many of whom are having their own homes. It is stated that the buildings, namely, (1) Noorjahan and (2) Sangeeta, owned by one Mahmad Yakub Banarasi, were sealed pursuant to the Court orders. The orders containing directions requiring sealing of the said premises are annexed at ANNEXURES.R.8 and R.9 to the reply. It is stated in paragraph 5.22 that, for the purpose of rehabilitating the women engaged in prostitution, various schemes were suggested by the Women's Protection Home, District Industries Centre as well as the Surat Municipal Corporation, pursuant to which, a meeting was convened by the Police Commissioner on 2.10.2003 of the Collector, Surat, the officers from various departments of the State Government, NGOs and leaders of the sex workers and, after discussion, it was found that about 200 women could be accommodated in the Women's Protection Home where the facilities are better than those in which they are at present living. The president of the petitioner-association, Nirmala Appa Swamy, however, had clearly stated that they were not ready to stay in the Women's Protection Home and that they were willing to reside elsewhere, provided the Government gives them houses and establishes colonies for them. It is stated that residing in the Chakla Bazaar area was a question between the women concerned and the

landlords. However, the respondents Nos.4 and 5 would certainly restrain the activities which were in violation of the provisions of the said Act. It is stated that it appears that, in substance, the petitioners want to perpetuate the illegal activities of prostitution in the notified area.

4.2 In the affidavit-in-reply dated 29.4.2003 filed in Special Civil Application No.4594 of 2003, a copy of which is also annexed at Annexure-R.1 to the affidavit-in-reply filed in Special Civil Application No.15195 of 2003, the allegations of harassment or indiscriminate arrests of the women made in the petition are denied and it is stated that, due to industrial growth, lakhs of labourers from different parts of India migrated to Surat in search of jobs and many of them tend to visit prostitutes which has given impetus to prostitution in the area. It is pointed out in para 6 of the reply that Mirza Sami Road is today one of the busiest roads of the city with heavy traffic and is used by thousands of cyclists, pedestrians and school-going children every day. The passers-by, including a large number of women, students and other civilians, have to regularly witness embarrassing scenes as the sex workers often make embarrassing gestures at them. It is stated that the said red light area, over a period of time, turned into an area wherein hectic immoral activities are conducted all the 24 hours and the area had become a centre for harbouring anti-social elements and criminals. It is stated that the middlemen, who became landlords through huge earnings, in connivance with sex workers, with a view to pre-empt any action of shifting of the sex workers from the area, issued notices to the occupants who were in fact women employed by them, to vacate the premises on the plea that they used the premises against their will. Against such notices, several litigations were initiated where the Government or the police authorities were not made parties and such litigations proceeded hand in glove resulting in interim injunctions from the Courts in favour of the women, rendering the provisions of Section 18 of the Act ineffective. The activities of the sex workers in the notified area have

led to serious health hazards. Surat has been reported as one of the districts having the highest number of HIV positive tested patients. It is contended that police authorities are targeted with the allegations of beating up the sex workers and of being in league with the builders of the area. Such allegations are made only for the purpose of obtaining injunctions so that the police is handicapped from taking actions in accordance with

law. It is alleged that the public interest litigation in the nature of this petition was merely an attempt to restrict the police from adopting the due process prescribed under the law and to handicap the authorities from enforcing the impugned notification. It is pointed out that, till date, out of the 23 petitions filed in the High Court, 18 were withdrawn and 5 were pending. The matter was also taken up before the National Human Rights Commission and, after hearing the prosecution and the applicants, the matter had been disposed of. The matter was even carried to the Honourable Supreme Court and after hearing both the sides, the special leave petition was withdrawn. It is stated that approximately 250 sex workers were currently carrying on their business in and around Chakla Bazaar area at the time when the affidavit was filed. It is stated that the parameters enunciated by the Honourable the Supreme Court in D.K.BASU's case are strictly adhered to by the police while making arrests. It is pointed out that small rooms (kholis) referred to by the petitioner are in fact brothels and

for effective implementation of the prohibitory orders, the police authorities are required to conduct raids in accordance with law.

4.3 In the affidavit-in-reply dated 24.2.2004 filed on behalf of the respondent, it is pointed out that since the month of August, 2003, the sex workers are residing at Khajurwadi, Limbayat Mithikhadi, Dhastipura Nasirnagar and Fulwadi localities in Surat district. As per the information of the Police Department, Nirmala Swami, the president of the petitioner Mandal, had convened a meeting of the sex workers in order to collect their respective names and addresses, which they refused to divulge to the police. It is stated that all those sex workers were between the age of 50 to 60 years and they bring in young girls from outside and involve them in the work of prostitution. It is stated that girls are brought into the city from Bombay, Hyderabad, Andhra Pradesh, Kolkatta, Karnataka and Nepal. It is reiterated that sex workers refused to go and stay in Nari Suraksha Gruh. Minutes of the meeting dated 3.10.2003 under the chairmanship of the Chief Secretary are produced at Annexure-R.2 to this reply. In the said meeting, 14 officers had remained present and it was decided to send the sex workers back to their respective native places in Nepal and other parts of the country under full police protection. It is also pointed out that, on 20.11.2003, a meeting was held at the Collector's office, Surat in presence of the Joint Secretary, Women and Children Development Department and other officers, and N.G.O.

and sex workers and, at the said meeting, a package of Rs.35,000/- was offered to each of the sex workers which would include training programme, food bills, stipends etc. At the said meeting, it was resolved that the police would play the role of a mediator to get the deposit amounts belonging to the sex workers back from the landlords. However, no sex worker was ready to accept the said package. It is stated that, even today, the State Government was ready to give effect to this package for any sex worker in Surat City who was ready to avail of the rehabilitation programme. A copy of the minutes is annexed at Annexure-R.4 to the said affidavit-in-reply. The minutes at Annexure-R.5 in respect of the meeting held on 26.11.2003 under the chairmanship of the Deputy Commissioner of Police, North Division, Surat, are relied upon to show that a public appeal was made calling upon the sex workers to accept the package of Rs.35,000/- each and, at the said meeting, the landlords had shown their willingness to return the amount of deposit of the sex workers lying with them. It is stated in para 8 of the said affidavit-in-reply that, on 1.12.2003, again a meeting was convened under the chairmanship of the District Social Welfare Officer in presence of the Police Inspector, which was attended by the landlords and 28 sex workers and, in that meeting, the president of the petitioner-association, Nirmala Swami, had refused to receive back the deposit from the landlords and the sex workers had stated that only if the landlords were ready to pay Rs.2,00,000/- in cash in addition to the amount of deposit, that they would accept the deposit back. The landlords declined to give additional amount of Rs.2,00,000/-, but, they were willing to return the amount of deposits lying with them. It is stated that as on the date of this affidavit (24.2.2004), 30 sex workers had accepted the amount of deposit returned by the landlords and had handed over vacant possession of the premises to them under a Kabja Receipt, copies of which are at Annexure-R.8 to this affidavit.

Arguments and Citations:

5. It has been contended by the learned counsel on behalf of the petitioners that the right to reside in "kohlis" (i.e. rooms) of the notified area of Chakla Bazaar was a fundamental right of the prostitutes/sex workers and they cannot be prevented from occupying their residence except in accordance with law. It was submitted that merely because these women were in the prostitution trade, it did not deprive them of their right to life and liberty. It was submitted that prostitution, per se, was not a criminal offence and it was only when a prostitute operated within the notified

area, the offence was committed. Therefore, prostitutes can reside in the notified area and had a right to carry on their trade outside the notified area. Even if the prostitutes carry on their work outside the notified area, where it was not an offence under Section 7 of the Act, their right to reside in the notified area cannot be taken away and no raids can be conducted at the places where they reside. It was submitted that even if, as a long term measure, they were required to be rehabilitated at some other places outside the notified area, since they were not going to be easily accepted by the society as honourable citizens, they were required to be kept together in the same locality and cannot be scattered, because, that would result in depriving them of their livelihood. It was argued that the provisions of Section 7 (1) (b) of the Act did not lay down any guidelines for the Commissioner of Police or the District Magistrate while issuing the order notifying the area in which prostitution would be an offence under Section 7 of the Act. It was submitted that there was no indication in Section 7 (1) (b) as to what type of other places can be notified by the Commissioner or the Magistrate as the areas in which prostitution was prohibited in the premises situated in such areas. It was also argued that the religious, educational and other institutions have come up only in the recent past while the occupation of prostitution was carried out by women since time immemorial and that aspect has not been taken into account before issuing the impugned notification by the Commissioner. It was, therefore, submitted that both, the provisions of Section 7 (1) (b) of the Act and the impugned notification issued under Section 7 (1) (b) were arbitrary and discriminatory in nature and violative of the fundamental rights of the prostitutes of that area guaranteed by Articles 14, 19 (1) (d) (e) (g) and 21 of the Constitution. The learned counsel argued that Section 14 of the Act, empowering arrest without warrant by making all offences under the Act as deemed to be cognizable offences, has the effect of treating unequals as equals inasmuch as, though the offences under Sections 7 and 8 committed by the prostitutes were of a minor nature, even such offenders could be arrested without warrant. It was, therefore, submitted that Section 14 of the Act violated the provisions of Article 14 of the Constitution. In the context of Section 15 of the Act, it was argued that the power to search without warrant was given to the Special Police Officers without laying down proper guidelines and was, therefore, likely to be abused. It was submitted that the provisions of Section 15 (4) empowering the police officer to enter the premises and remove persons found therein was in blatant

disregard of the rights of the persons living in the premises and violated Articles 14 and 21 of the Constitution. In the alternative, it was submitted by the learned counsel that prostitutes were the victims of the offences under the Act and of trafficking by unscrupulous elements, and should be appropriately rehabilitated without treating them as criminals. It was submitted that any rehabilitation scheme should be formulated only in consultation with the persons affected, namely, the prostitutes of the area and, as far as possible, they should be housed together. It was submitted that prostitutes cannot be removed to protection homes nor can their houses be invaded without the authority of law or without following the due process of law and, therefore, the police authorities should not take law in their own hands and enter the premises at their own will without following due process of law, until rehabilitation programme is formulated and gathers momentum.

5.1 In support of their submissions, the learned counsel for the petitioners relied upon the following decisions:

(i) The decision of this Court in BAI SHANTA v. STATE OF GUJARAT reported in AIR 1967 GUJARAT 211 was cited for the proposition that the said Act did not aim at abolition of prostitutes and prostitution as such, and did not make it per se a criminal offence so as to punish a woman because she prostitutes herself, but its purpose was to inhibit or abolish the commercialised vice. However, certain exceptions to this are found in Sections 7 and 8 of the Act. Section 7 of the Act made punishable the practice of prostitution in or in the vicinity of certain public places and this provision inhibits the woman herself from the practice of her profession in contravention of its terms and to that extent renders prostitution a penal offence.

(ii) The decision of the Bombay High Court in STATE v. GAYA reported in AIR 1960 BOMBAY 289 rendered in the context of the provisions of Section 3 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 was cited for the proposition that the said Act was passed in pursuance of the International Convention signed at New York for the suppression of immoral traffic in women and girls and it was never intended that the women or girls used for such traffic should be liable to punishment when there was nothing to show in the

complaint that they were either keeping or managing or acting or assisting in the keeping or management of a brothel.

(iii) The decision of the Allahabad High Court in SHAMA BAI v. STAE OF UTTAR PRADESH reported in AIR 1959 ALLAHABAD 57 was cited for the proposition that, under Article 19 (1) (g), every person has normally got a right to practise any profession or carry on any occupation, trade or business of his choice. Work of a prostitute is a profession, occupation or trade within the meaning of Article 19 (1) (g) of the Constitution. The provisions of Sections 3 to 10, 12, 18 and 20 did not have the effect of stopping the profession or trade of a prostitute altogether. It was held that the provisions of Section 20 of the Act are unconstitutional as they violated Articles 14 and 19. We may note here that this decision of the Allahabad High Court has been overruled by the Constitution Bench of the Supreme Court by its decision in STATE OF U.P. v. KAUSHAILIYA reported in AIR 1964 SC 416.

(iv) The decision of the Madras High Court in RE RATNAMALA AND ANOTHER reported in AIR 1962 MADRAS 31 was cited for the proposition that the purpose of the said Act was to abolish commercialised vice, namely, the traffic in women and girls for the purpose of prostitution as an organized means of living. The idea is not to render prostitution per se a criminal offence or to punish a woman merely because she prostitutes herself as is clearly indicated by the last part of the definition of "brothel" in Section 2 (a) of the Act, which implies that where a single woman practises prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to "brothel".

(v) The decision of Kerala High Court in T.JACOB v. STATE OF KERALA reported in AIR 1971 KERALA 165 was cited for the proposition that prostitution in itself is no offence except in the manner covered under Sections 7 and 8.

(vi) The decision of the Supreme Court of Bangladesh in BANGLADESH SOCIETY FOR THE ENFORCEMENT OF

HUMAN RIGHTS v. GOVERNMENT OF BANGLADESH reported in Vol.LIII 2001 Dhaka Law Reports was cited for the proposition that sex workers as citizens had enforceable fundamental rights under Articles 31 and 32 of the Constitution of Bangladesh, 1972. It was held that, upon their wholesale eviction from Tanbazar and Nimtali, prostitutes had been deprived of their livelihood which amounted to deprivation of the right to life making the action unconstitutional and illegal. It was also held that rehabilitation scheme must not be incompatible with their dignity and worth of human person but should be designed to uplift personal morals and family life and provide jobs giving them option to be rehabilitated or to be with their relations, and, facilities for better education and better economic opportunities should be provided to minimise the conditions that gave rise to prostitution.

(vii) The decision in GAURAV JAIN v. UNION OF INDIA reported in (1997) 8 SCC 114 was cited to point out that, in para 27 of the opinion of Justice K. Ramaswamy, it was observed that women found in the flesh trade should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. It was observed that: "...commercial exploitation of sex may be regarded as a crime but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of gender-oriented vulnerability."

We may just note here that the Supreme Court in GAURAV JAIN and UNION OF INDIA reported in (1998) 4 SCC 270 reviewed the said decision and held that power conferred by Article 142 (1) cannot contravene the provisions of Article 145 (5) and set aside the directions given by Justice K. Ramaswamy relating to prostitution and/or its amelioration or eradication. It was, however, observed that this should not be understood as preventing the Union or State Governments from formulating their own policies in this area or taking measures to implement them.

(VIII) The decision of the Supreme Court in STATE OF MAHARASHTRA v. MADHUKAR NARAYAN MARDIKAR reported in AIR 1991 SC 207 was cited for the proposition that even a woman of easy virtue is

entitled to privacy and no one can invade her privacy as and when one likes. She is entitled to protect her person if there is an attempt to violate it against her wish and is equally entitled to the protection of law. It was held that the observations of the High Court that the complainant being an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person was wrong. On the contrary, she was honest enough to admit the dark side of her life.

6. The learned Assistant Government Pleader, appearing for the respondent authorities, submitted that when police officers exercise their functions under the Act in discharge of statutory duties for implementing the provisions of the Act by effecting arrests and in searching premises, they did not violate any fundamental rights of the petitioners, including the right to privacy. It was submitted that the right to privacy cannot be pleaded against search of premises in which there are reasonable grounds to believe that offences punishable under the Act are being committed. It was submitted that prostitution per se was punishable in the notified area under Section 7 and also in any area under Section 8. Prostitution itself was considered to be illegal having regard to the various provisions of the Act, including those for removal of prostitute from the localities as contemplated by Section 20 of the Act. It was submitted that having regard to the object sought to be achieved by the provisions of the Act and the nature of the offences involved, it was absolutely necessary to invest the police officer with the power of arrest without warrant and search without warrant. It was submitted that the provisions of the Act contained sufficient safeguards against any abuse of powers of search and arrest. Moreover, the restrictions imposed by the provisions were reasonable and in the interests of the general public. It was submitted that Sections 7, 14 and 15 of the Act did not in any manner violate Articles 14, 19 (1) (d) (e) (g) or 21 of the Constitution. It was further submitted that rehabilitation of all the prostitutes in the same locality will not be useful in eradicating the evil and they would carry on the work of prostitution in the locality or area where they are rehabilitated, which again would create a situation similar to the one which existed for a number of decades in the Chakla Bazaar, which is now brought under control by stringent enforcement of the provisions of the Act

after issuance of the notification under Section 7 (1) (b). The learned counsel submitted that the Government would respond positively to any suggestions or directions that may be given for evolving a mechanism which would solve the problems of sex workers as well as ensure that the provisions of the said Act are duly complied with. The learned counsel referred to the affidavits-in-reply filed on behalf of the respondents to point out the harm caused by the activities which were carried on in the Chakla Bazaar in violation of the provisions of the said Act and also to point out that the police officers were acting in accordance with the provisions of law to carry out the mandate of the law.

6.1 In support of her submissions, the learned counsel for the respondent authorities relied upon the following decisions:

(i) The decision of the Supreme Court in STATE OF UTTAR PRADESH v. KAUSHAILIYA reported in AIR 1964 SC 416 was cited to point out that the Supreme Court had held that it cannot be gainsaid that the vice of prostitution is rampant in various parts of the country and that there cannot be two views on the question of its control and regulation. It was held, in the context of the provisions of Section 20 of the Act that the restrictions placed upon the prostitutes were certainly in the interests of the general public and, as the imposition of the restrictions is done through a judicial process on the basis of a clearly disclosed policy, the said restrictions were clearly reasonable. The Supreme Court observed that, if the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. In para 12 of the judgment it was held that if the presence of a prostitute in a locality within the jurisdiction of a Magistrate has a demoralising influence on the public of that locality, having regard to the density of population, the existence of schools, colleges and other public institutions in that locality and other similar causes, "we do not see how an order of deportation may not be necessary to curb the evil and to improve the public morals". It is held that if the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so

subversive of public morals and so destructive of public health that it is necessary in public interests to deport her from that place, "we do not see any reason why the restrictions should be held to be unreasonable". The Supreme Court held that the provisions of Section 20 of the said Act were reasonable restrictions imposed in public interest within the meaning of Article 19 (5) of the Constitution and, therefore, did not infringe the fundamental rights of the respondents-alleged to be prostitutes- under Article 19 (1) (d) of the Constitution.

(ii) The decision of the Supreme Court in P.N.KAUSHAL v. UNION OF INDIA reported in AIR 1978 SC 1457 was cited for the proposition reflected in para 37 of the judgment in the quotation of Field, J., that the manner and extent of regulation rest in the discretion of the governing authority. In para 56 of the judgment, the Court approvingly citing Das C.J. held ..."We have no hesitation, in our hearts and our heads, to hold that every systematic, profit oriented activity, however sinister, suppressive or socially diabolic, cannot, ipso facto, exalt itself into a trade". The Court held that State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognized as trade or business.

(iii) The decision of the Supreme Court in GAURAV JAIN v. UNION OF INDIA reported in AIR 1997 SC 3021 was cited to point out that in para 16 of the judgment in the context of the provisions of Section 2 (a) of the said Act, it was held that all that was essential to prove was that a girl/woman should be a person offering her body for promiscuous sexual intercourse for hire and that sexual intercourse was not an essential ingredient. It was held that a single instance coupled with the surrounding circumstances may be sufficient to establish that the place was used as a brothel and the person was keeping it. The prosecution has to prove only that in a premises a female indulges in the act of offering her body for promiscuous sexual intercourse.

(iv) The decision of the Supreme Court in DELHI

ADMINISTRATION v. RAM SINGH reported in AIR 1962 SC 63 was cited for the proposition that the expression "police duties" in Section 2 (i) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 included all the functions of the police in connection with the purpose of the Act and, in the special context of the Act, they will include the detection, prevention and investigation of offences and the other duties which have been specially imposed on them under the Act. The Supreme Court held that the Act provides machinery to deal with the offences created and its necessary implication must be that new machinery is to deal with those offences in accordance with the provisions of the special Act and, when there is no specific provision in such Act, in accordance with the general procedure and that no other machinery is to deal with those offences.

(v) The decision of the Constitution Bench of the Supreme Court in SUB DIVISIONAL MAGISTRATE v. MST. RAM KALI reported in AIR 1968 SC 1 was cited to point out that, after reviewing the provisions of Sections 3, 7 and 18 of the said Act it was held that, it was not correct to say that the set of facts to be proved in prosecution under Sections 3 or 7 and in proceedings under Section 18 was not identical. In the former, the prosecution to succeed has to establish either the intention or knowledge referred to therein but in the latter, they are not necessary ingredients. Section 18 provides for two classes of cases, namely, those coming either under Section 3 or 7 as well as under Section 18 and those coming only under Section 18. These were two distinct classes of cases and such classification has reasonable relationship with the object sought to be achieved. It was held that bearing in mind the purpose of these provisions as well as the scheme of the Act and on a harmonious construction of the various provisions in the Act, it was of the opinion that the Magistrate, who was also a Court as provided in Section 22, must at the first instance proceed against the persons complained against under the penal provisions in Sections 3 or 7, as the case may be, and only after disposal of those cases, take action under Section 18 if there was an occasion for it. The Magistrate was bound to take cognizance of any cognizable offence brought

to his notice under Sections 190 (1) (b) of the Code of Criminal Procedure.

(vi) The decision of the Supreme Court in KRISHNAMURTHY v. PUBLIC PROSECUTOR reported in AIR 1967 SC 567 was cited for the proposition that even a single instance with surrounding circumstances was sufficient proof for keeping a brothel. It was held that one will be guilty of the offence under Section 3 (1) of the Act if he does any of the acts mentioned in that sub-section in relation to a brothel. The appellant's house on the facts found was being used as a brothel. The girls were offered for the purpose of prostitution. The house was used for such purposes undoubtedly for the gain of the appellant who pocketed the money which was given for committing prostitution on the girls.

(vii) The decision of the Supreme Court in CHITAN J. VASWANI v. STATE OF WEST BENGAL reported in (1975) 2 SCC 829, which was rendered in the context of the provisions of Sections 3 (1), 7 (2) (a), 10 (2) and 18 of the Act, was cited to point out that, Section 18 (1) applied to brothel within the vicious distance of 200 yards of specified types of public institutions and Section 18 (2) operated not merely in places within the offending distance of 200 yards but in all places where the activity of prostitution has been conducted. It was observed that Section 18 (1) providing a summary procedure for closing down obnoxious places of prostitution, without going through the detailed process of a criminal prosecution, was a quick-acting defensive mechanism, "calculated to extinguish the brothel and promote immediate moral sanitation, having regard to the social susceptibility of places like shrines, schools, hostels, hospitals and the like". Section 18 (2), on the other hand, operates only where persons have been convicted of offences under Section 3 or Section 7. It was held that it stands to reason that if the purpose of extirpating the commercial vice from that venue were to be successful, the occupier must be expelled therefrom.

(viii) The decision of the Supreme Court in P.N.KRISHNALAL AND OTHERS v. GOVERNMENT OF KERALA reported in 1995 Supp (2) SCC 187 was cited to point out that it was held that State

has the power to prohibit trade or business which are illegal, immoral or injurious to the health and welfare of the people. The Supreme Court held that no citizen has a fundamental right to carry on any trade or business in activities which are inherently vicious, pernicious, criminal in propensity, immoral, obnoxious and injuries to health, safety and welfare of the general public. It is, therefore, a question of public expedience and public morality that the State is fully competent to regulate the business in liquor or intoxicating drug to mitigate its evil or to suppress it in its entirety and there was no inherent right in a citizen to conduct business or trade in adulterated intoxicated liquor by retail or wholesale. There is no inherent right in crime. Prohibition of trade or business of obnoxious or dangerous substances or goods by law is in the interest of social welfare.

(ix) The decision of the Bombay High Court in SAYED ABDUL KHAIR v. BABUBHAI JAMALBHAI reported in 1974 Cri.L.J. 1337 was cited for the proposition that neither Article 14 nor any other provision of the Constitution gives the pimps, procurers or brothel-keepers any right to contend that a woman and a girl must be treated alike for all purposes by the Legislatures, and that the distinction between a woman and a girl in Section 15 (4) of the Act was consistent with the objects sought to be achieved by the Legislation. It was held that Section 15 (4) was not discriminatory inasmuch as young girls all over the world are special victims of the vice market. It was also held that power given to the Special Police Officer under Section 15 was not an arbitrary one and was subject to immediate scrutiny of the Magistrate as provided in Section 17 (1). Further, Section 15 (5) and Section 16 (2) are safeguards enough against arbitrary exercise of his power by the special officer.

Reasoning:

7. It was contended on behalf of the petitioners that prostitution is exercise of fundamental right of women to practice any profession or carry on any occupation, trade or business and it should be open for the women to reside in their homes in Chakla Bazaar and carry on their profession. Since prostitution was not per se illegal, total restriction on the fundamental right of the prostitutes as imposed by the notification

issued under Section 7 (1) (b) and the police action taken against them by raiding their premises were unwarranted and unconstitutional.

7.1 There has been a considerable acrimonious debate over the question: Is prostitution a form of exploitation to be abolished or an occupation to be regulated ? The question is no longer about morality: is prostitution a vice and are those involved evil or lacking in morals ? There are basically two camps, those seeking to eradicate prostitution and those who view the women involved as sex workers. The Court has to steer through the non-legal aspects of the debate, because, what social standards should be reflected in the laws in the matter of prostitution is in the legislative domain.

7.2 Prostitution in the modern times is not confined to street walking and its forms are diversified into various kinds, such as prostitution services, including date clubs, various kinds of services in adult entertainment, business facilities, meet and mate on the internet etc. Pornography acts as an arm of prostitution and often women coerced into pornography are coerced into prostitution.

8. Economic crisis, natural diseases, political unrest and conflict situations make women and children more vulnerable and easy prey to sex traffickers and recruits. The term "sex worker" does not dignify the women involved though it may dignify the pimps, procurers and traffickers who can call themselves "managers", "supervisors" and "organisers". Prostitution for women is considered not merely a temporal activity but rather a heavily stigmatized social status which in most societies remains fixed on them regardless of any improvement in behaviour. In a study of street prostitutes in Toronto, approximately 90% of women contacted indicated that they wished to stop working on the streets at some point of time, but felt unable or unclear about how to even begin the process, (see Prostitution and Civil Rights by Cataharine A. MacKinnon, Michigan Journal of Gender & Law, 1993, Volume 1:13-31). Often women who themselves view sex service as a temporary and part-time engagement are forced by legal and social labelling to remain prostitutes and to bear that status in all the walks of their life. Prostitutes epitomise social illegitimacy and are designated as a fair game for police scrutiny and social attack. If prostitutes by circumstances regulated by commercial interests of the middlemen and organizers cannot leave, they remain as sexual slaves. Women in prostitution usually begin their career due to poverty

and are kept indebted and poor by pimps and other middlemen who control their earnings and movements making them a legal non-person in a biased society. Article 23 of the Constitution of India prohibits traffic in human beings, begar and other similar form of forced labour. The victim of prostitution is the prostitute herself who is placed in a slave-like condition and subjected to virtually unlimited authority of others in the trade for rendering distinctly personal service. Through contrived and manipulated indebtedness to which she gets subjected, she is unable to ward off the shackles of poverty and inch towards a dignified living. Servitude results from indebtedness and poverty. The victims of the vice of prostitution believe that they have no viable alternative but to continue in the field of their exploitation for survival. Poverty and indebtedness make exit from prostitution impossible for such women. This condition of involuntary servitude of most of the women and girls in prostitution, where their distinctly personal services are bought and sold as chattel, would justify the Courts and other constitutional authorities in viewing prostitution as a form of modern slavery and its perpetrators, pimps and traffickers as exploiters of the victim prostitutes in violation of their right against exploitation guaranteed by Article 23.

8.1 Our constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of human body which is not simply organic. The very nature of commodifying the human body devalues the respect that the Constitution regards as inherent in the human body by guaranteeing fundamental right against exploitation under Article 23 and by issuing directives under Articles 39 (e) and 46 that the State should strive towards securing that, health and strength of men and women are not abused and citizens are not forced to enter avocations unsuited to their age or strength and to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitations.

8.2 The most potent rejoinder against recognition of the degrading practice of prostitution, which undermines womanhood itself, comes from Article 51-A (e) of the Constitution, which ordains that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The fact that prostitution is a practice derogatory to the dignity of women is universally recognized and is clearly reflected from the

"Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others", to which India was a signatory having signed it on 9.5.1950 and which was ratified on 9.5.1953. The Convention was approved by the General Assembly of the United Nations in its Resolution 317 (IV) of 02 December, 1949. The preamble of the Convention records that:

> "....prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community....." (emphasis added)

8.3 The parties to the Convention agreed under Article 1 to punish any person who, to gratify the passions of another, procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person, or exploits the prostitution of "another person", even with the consent of that person. The "Convention on the Elimination of all Forms of Discrimination Against Women of 1979" provided in Article 6 that State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. The General Assembly of the United Nations passed a Resolution on 16.12.1983 (A/RES/38/107) in its meeting No.100 reaffirming the objectives of the United Nations Decade for Women: Equality, Development and Peace, bearing in mind, "the essential role of women in the welfare of the family and the development of society" and "considering that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community", urged the Member States "to take all appropriate humane measures, including legislation, to combat prostitution, exploitation of the prostitution of others and all forms of traffic in persons and to provide special protection to victims of prostitution through measures including education, social guarantees and employment opportunities for those victims with a view to their rehabilitation".

8.4 To recognize prostitution as a legitimate means of livelihood would be an open invitation to trafficking in women which is shunned internationally and in all the civilized nations of the world. "Trafficking in women and girls is one of the most corrosive forms of violation of human rights. It results in gradual total destruction of a woman's personal identity, and her right to live as

a free human being in a civilized society. The victim is subjected to violence, total humiliation and violation of personal integrity. The victim of such devastating violence may also end up with life-threatening HIV/AIDS/STD or a lifetime of trauma, drug addiction or personality disintegration. It is a denial of the right to liberty and security of person, the right to freedom from torture, violence, cruelty or degrading treatment, the right to a home and a family, the right to education and employment, the right to health care - everything that makes for a life with dignity. Trafficking has been rightly referred to as a modern form of slavery". (See Consultation Paper on "TRAFFICKING IN WOMEN AND GIRLS" by Justice Sujata Manohar for the Expert Group Meeting on "Trafficking in women and girls" 18-22 November 2002 Glen Cove, New York, USA).

8.5 It is, therefore, difficult to accept the contention raised on behalf of the petitioners that the Court should recognize the right to prostitution as a fundamental right of women or girls in it, notwithstanding it being derogatory to the dignity of women, the United Nation's Resolution dated 16.12.1983, exhorting the States to combat prostitution by taking appropriate humane measures including legislations and the provisions of the said Act. The Court has to be wary of the vested interests in the prostitution of others, thriving on the commercial gains from exploitation of prostitutes while posing as champions of their rights. A multitude of research around the world has established that all prostitution causes harm to women. Approval to prostitution would tend to institutionalize, promote and teach the abuse of women and create an ever-expanding industry which normalizes that abuse. It is never right for a man to be able to buy a woman and recognition of prostitution would be an undesirable phenomenon in a civilized modern society. Prostitution, in short, becomes an activity that is degrading to individual dignity of the prostitute and it is a vehicle for pimps and customers to exploit the disadvantaged position of women in our society. The need to outlaw organized prostitution and brothels, target the demand that drives the industry and to ensure a range of programmes to assist women out of prostitution, can be effectively met by a proper implementation of the provisions of the impugned Act. We, therefore, outright reject the suggestion made on behalf of the petitioners that the Court should help the women wanting to pursue prostitution as profession to carry on their work outside the notified area while occupying the premises within the notified area. Even if no sexual encounters take place

in the room (kholi) occupied by a prostitute in the notified area, it would none the less be a brothel within the definition of that word in Section 2 (a) of the Act if such room was used for the purpose of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. The purposes of prostitution can be fully achieved at the premises by making there of arrangements while the sexual encounter might be contemplated to be made elsewhere on the basis of arrangements. The words "for the purpose of prostitution" cover meeting and making of arrangements for prostitution elsewhere than at the place of meeting and the word "brothel" is not limited in its meaning to place where intercourse for money actually takes place.

9. It was argued that Section 7 (1) of the Act created invidious discrimination between prostitutes working in the notified area and those working outside the notified area without there being any justification for such differential treatment by making prostitution carried on in a notified area an offence. It was also contended that Section 7 was arbitrary because, even if the premises in which prostitution was carried on are situated within a locality in which prostitution was not objected to, it nonetheless is made an offence. It was also contended that there were no guidelines laid down for notifying the public places.

9.1 The provisions of Sections 7 (1) and 7 (3), which are relevant in context of the contentions raised, read as under:

"7. Prostitution in or in the vicinity of public places:- (1) Any person, who carries on prostitution and the person with whom such prostitution is carried on, in any premises-

(a) which are within the area or areas, notified under sub-section (3), or

(b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or Magistrate in the manner prescribed,

shall be punishable with imprisonment for a term which may extend to three months".

(1-A) xxx xxx xxx

(2) xxx xxx xxx

"(3) The State Government may, having regard to the kinds of persons frequenting any area or areas in the State, the nature and the density of population therein and other relevant considerations, by notification in the official gazette, direct that prostitution shall not be carried on in such area or areas as may be specified in the notification."

"(4) Where a notification is issued under sub-section (3) in respect of any area or areas, the State Government shall define the limits of such area or areas in the notification with reasonable certainty."

9.2 Section 7 (1) makes prostitution an offence if committed in any premises which are within the area notified as per sub-section (3) of Section 7 and those which are within a distance of 200 metres of any place of public religious worship, educational institution, hospital, nursing home or such other public place of any kind as may be notified by the Commissioner or the District Magistrate in the prescribed manner under clause (b) of sub-section (1). The provision, therefore, contains intrinsic guidelines as to the nature of the area in which it would be an offence to carry on the activity of prostitution in any premises. Even while notifying "other public places of any kind", the Commissioner of Police or the District Magistrate has to keep in mind the object of this provision which was to prohibit prostitution in or in the vicinity of public places. Section 7 (3) also effectively guides the State Government in notifying the area in which prostitution per se would be an offence. These are: the kinds of persons frequenting the area, the nature and the density of the population in such area and other considerations which are relevant to the object underlying the Act which was enacted in the background of the "International Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others" signed and ratified by India, whereunder prostitution and the accompanying evil of traffic in persons for the purpose of prostitution are declared to be incompatible with the dignity and worth of the human person and as endangering the welfare of the individual, the family and the community. Under Article 253 of the Constitution, the Parliament has power to make any law for implementing any

Treaty, Agreement or Convention with other countries or any decision made at any International Conference, Association or Body. Therefore, when the power is exercised under such law by the State executive or the judiciary, even the relevant covenants, agreements or decisions can provide useful guidelines for exercise of the powers under the Act in the matter of implementation of the statutory provisions so enacted.

9.3 The impugned notification dated 23.2.2000 issued by the Police Commissioner under Section 7 (1) (b) of the said Act reads as under:-

"Notification under the Section 7 (1) (b) of
Immoral Traffic (Prevention) Act, 1956.

No.P.C.B./Notificatiion/329/2000 Dtd. 23.2.2000

I, K.N.Sharma, IPS, Police Commissioner
Surat City Surat

In exercise of power vested in me, I hereby notify that, within the following notified areas and within the distance of 200 metres, in the jurisdiction of Chowk Bazar Police Station under Surat City Police Commissionerate no person shall carry on prostitution, OR shall indulge in prostitution, OR knowingly permit the prostitutes for purpose of their trades to resort to or remain, in their places and or the owner, lessors, administrators or person in charge of the premises and buildings situated in this area shall knowingly permit to use for prostitution, their premises or any part thereof & or being the owner, lessor OR land lord agents of such premises shall let the same OR knowingly permit the user of such premises or any part thereof with the knowledge that the same or any part thereof may be used for prostitution and knowingly shall take part in the use of such premises or any part thereof and shall carry on prostitution:-

1) IP Mission Higher Secondary High School Muglisara Road, Surat.
2) Chintamani Parshwanathji Jain Temple Shahpor Road, on the corner of Marjan Sami Road
3) 400 years old Darga Sharif, Marjan Sami Road
4) Marjan Sami Mosque, Marjansami Road.

Whoever commits breach of this notification or makes violation of the same shall be on conviction, punished with imprisonment for a term which may extend for three months for the first offence and on second or subsequent conviction shall be punished with imprisonment for a term which may extend to six months and when such offence is in relation to child or a minor, the offender shall be on conviction be punished with imprisonments which may extend to 10 years or life imprisonment but shall not be less than seven years and also with fine.

This notification will come in force on 1.3.2000

In promulgation thereof, I have put my signature and seal today on 23.2.2000.

Sd/-
(K.N.Sharma)
Police Commissioner
Surat City"

9.4 The above order of the Commissioner of Police notifies with sufficient clarity the areas, which are in and around a secondary high school, a jain temple, a dargah sharif and a mosque. These are public places regularly frequented by a large number of people. It was within the powers of the Commissioner to notify the area around these places of public religious worship and educational institutions under Section 7 (1) (b) rendering the activity of prostitution an offence under Section 7 (1) of the Act. It would be noticed that while offence under Section 7 (1), 7 (1-A), 7 (2) (b) and 7 (2) (c) are in relation to the areas notified under Section 7 (1) (a) and (b), the offence under Section 7 (2) (a) is by a keeper of public place, as defined in Section 2 (h) (any place intended for use by, or accessible to, the public including public conveyance), who permits prostitutes for the purpose of their trade to resort to or remain in such place. In other words, offence under Section 7 (2) (a) is not confined to areas notified under Section 7 (1) (a) and (b), but is in respect of any public place whether or not in such notified area. The offence of seducing or soliciting for the purpose of prostitution under Section 8 is also in the context of any public place. The provisions of Section 7 (1) (b) are aimed at taking prostitution off the areas notified around the educational institutions, public religious worship, hospitals, nursing homes and hostels or other public places as may be notified, with a view to

eradicate the various forms of social nuisance arising from the display of the sale of sex. These include street conjestion, noise, harassment of non-participants and general detrimental effect on the public frequenting such areas especially children. The elimination of prostitution and the social nuisance it creates, from the notified areas and other public places is a governmental objective of sufficient importance and treating prostitution in such notified area and public places as an offence does not create any invidious discrimination between the prostitutes operating in such areas or public places and their sisters operating elsewhere. There is a rational connection between the impugned provisions of Section 7 and the prevention of the social nuisance associated with prostitution in such notified areas or public places. The objectives of the impugned provision is of minimising the public exposure of an activity that is degrading to women. Public places provide an environment for pimps and procurers to attract women and girls or to pick up children by befriending them or offering them short-term affection and economic assistance. The purpose of these provisions is to proscribe prostitution in public places and they are neither discriminatory nor arbitrary and, therefore, do not violate the right to equality by criminalising prostitution in public places.

9.5 In SHANKAR v. STATE OF TAMIL NADU reported in (1994) 4 SCC 478, the Supreme Court observed, albeit in a different context, that prostitution is an activity, bad in social sense as witnessed and is prohibited legally. As held by the Constitution Bench of the Supreme Court in KAUSHAILIYA (supra), if in a particular locality the vice of prostitution is endemic, degrading those who live by prostitution and demoralising others who come into contact with them, the Legislature may have to impose severe restrictions on the right of a prostitute to move about and to live in a house of her own choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. The Supreme Court held that it cannot be gainsaid that the vice of prostitution is rampant in various parts of the country. There cannot be two views on the question of its control and regulation. If carrying on prostitution in an area has demoralising influence on the public of that area, having regard to the density of population, the existence of schools, colleges and other public institutions, it is difficult to see how the provision curbing such evil aimed at improving public morals and

eliminating social nuisance can be said to be an unreasonable restriction on the fundamental right to move freely or to reside and settle in any part of the territory of India guaranteed by Article 19 (1) (d) and (e) of the Constitution. The rights to freedom of movement and residence cannot prevent the State from making any law imposing reasonable restrictions in the interests of the general public. The impugned provisions of the Act are enacted with the object of "controlling the growing evil of prostitution in public places" and the restrictions placed upon the prostitutes are clearly reasonable and in the interest of general public. The ratio of the said decision of the Constitution Bench of the Supreme Court in KAUSHAILIYA (supra) for negativing the constitutional challenge on the ground of violation of Article 19 (1) (d) (e) against the provisions of Section 20 of the Act is applicable with equal force to the challenge raised in these petitions against constitutionality of the provisions of Section 7 (1) (b) of the said Act. Once the restrictions are reasonable and imposed by law in the interests of general public, there cannot be claimed any right to freedom of movement and residence as a fundamental right to the extent restricted by such law which falls within the ambit of Clause (5) of Article 19 of the Constitution.

9.6 The restriction on personal liberty imposed by Section 7 is in the interests of general public and is imposed by law enacted by the Parliament in the background of the Convention for Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others signed and ratified by India, and the deprivation of liberty to carry on prostitution in public places is as per the procedure established by law. Therefore, there is no violation of the fundamental right to life and personal liberty of persons guaranteed by Article 21 of the Constitution.

10. It was argued that the right to privacy of prostitutes gets violated every time the law enforcing agencies barge in the precincts of the premises in their occupancy and, therefore, the provisions of Section 15 read with Section 7 of the Act enabling the police to search the premises in which prostitutes may be living violate Article 21 of the Constitution.

10.1 The right to privacy is not absolute or unlimited and must be balanced with the needs of the community and with other rights. The right to privacy must be understood as recognizing a continuum of privacy rights which may be regarded as starting with a wholly

inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated, if at all. The extent of recognizable right to privacy would depend upon the context in which it is claimed. The community rights and the rights of fellow members place a corresponding obligation on a citizen thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is fully acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interactions, the scope of personal space shrinks accordingly. It was, however, argued that the fact that the work of a prostitute is commercial does not exclude it from the scope of the right of privacy. Commercial sex involves the most intimate of activity taking place in the most impersonal and public of realms, the market place where it is simultaneously all about sex and all about money. A prohibition on commercial sex, therefore, will not ordinarily encroach upon intimate or meaningful human relationships. Prostitution is quite different from the protected sphere of private intimacy where expression of sexuality, not the commercial aspect, is at the core. Central to the character of the activity of prostitution is that it is indiscriminate and loveless. It is, accordingly, not the form of personal and intimate sexual expression that is penalised, nor the fact that the parties possess certain identity. The law aims at sex which is both indiscriminate and for reward. The privacy element falls far short of deep attachment and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life. By making her sexual services available for hire to strangers in the market-place, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. It would be undoubtedly correct that this does not strip her of her right to be treated with dignity as a human being and to be respected as a person. But, it does place the prostitute or sex worker far away from the inner sanctum of protected privacy rights. We accordingly conclude that expectations of privacy of those involved in prostitution are relatively attenuated. Although the commercial value of her trade does not eliminate the claims of a prostitute to privacy, it does reduce them in great degree. The provision for limited intrusion into privacy under the prescribed conditions is essential and is a

reasonable restriction for achieving the objects of the law. Prostitution in itself is degrading to women, it is conducive to violent abuse of prostitutes both by their customers and pimps, it is associated with and encourages international trafficking in women, which India is obliged by its International law commitments to suppress, it leads to child prostitution, it carries an intensified risk of spread of sexually transmitted diseases especially HIV/AIDS, it has close connection with a high degree of drug abuses and crimes, such as assault, rape and even murder and it is a frequent and persistent cause of public nuisance. If the Parliament in its wisdom enacted the provisions of the said Act to combat prostitution and eradicate immoral traffic in women and girls in order to prevent their sexual exploitation or abuse for commercial purpose, such minimal intrusion in privacy by legitimate search of the premises in respect of which there are reasonable grounds for believing that an offence punishable under the Act has been or is being committed in respect of a woman, girl or any other person living in such premises would be justified, proportionate and reasonable. The challenge against the constitutional validity of the impugned provisions of Sections 7 and 15, therefore, fails.

11. In the context of Section 14 of the said Act, it was argued that it confers arbitrary power of arrest without warrant of even those who committed the offences under Sections 7 and 8 which were punishable with relatively minor punishment extending upto three months. The provisions of Section 14 violated, according to the learned counsel, right to equality of the prostitutes who were being treated under it on the same footing as the other offenders who exploited them and were guilty of aggravated form of offences under the Act.

11.1 It will be noticed from the provisions of Section 14 that it incorporates certain safeguards against indiscriminate or pointless arrests, the foremost being that such warrantless arrest can be made only by Special Police Officer or under his direction or guidance or subject to his prior approval. When the Special Police Officer directs warrantless arrest, otherwise than in his presence, he shall give such order in writing specifying the person to be arrested and the offence for which the arrest is being made. The person who is required to be so arrested has to be informed about the order and the order has to be shown when required by such person. There are, therefore, adequate safeguards against any arbitrary arrest without warrant. The fact that some offences are punishable with imprisonment with a maximum

period of three months cannot by itself be sufficient to hold that arrest without warrant is not justified in such cases. There are several offences even under the Penal Code which are made cognizable even though punishment for such offences may extend to six months or fine or even less than that. As for example, Section 138 (upto six months or fine or both), Sections 143, 151, 225-B, 269, 284, 289, 291, 337 (imprisonment upto six months or fine or both). Offence punishable under Section 188 for which simple imprisonment for one month or fine of Rs.200/- is provided, is also made cognizable. Offence under Section 294 (obscene acts and songs) for which imprisonment for three months or fine is provided, offence under Section 341 for wrongful restraint for which simple imprisonment for one month or fine is provided, are all cognizable offences. Thus, the nature of the offence may require that arrest in respect thereof be made without warrant and mere quantum of punishment prescribed for it is not a decisive factor. Therefore, it cannot be said that the provision of Section 14 of the Act, which makes any offence under the Act as deemed to be a cognizable offence, treats unequals as equals.

11.2 For the purpose of treating an offence under the Act as cognizable, there is no justification for making a distinction between those offences for which conviction may result into lesser punishment and those for which it may be higher depending upon the maximum punishment provided in respect of such offences under the Act. Apart from the fact that every police officer empowered to arrest without warrant may not be expected to know the details of complex penalty schemes, police officers in the field frequently have neither the time nor confidence to determine the severity of the offence for which they are considering arrest of a person. Penalties for ostensibly identical conduct can vary on account of facts, difficult, if not impossible, to know at the scene of an arrest. Is this the first offence or is the suspect a repeat offender ? Is the offence committed in its aggravated form ? Is the offence committed in respect of a minor or child ? These are some aspects which show that the claim that distinction should be made amongst the offences under the Act and all offences should not be deemed to be cognizable offences is not ultimately so simple, nor could it be, for, complications arise the moment we begin to think about the possible applications of criteria suggested for such distinction. The provisions of Section 14, therefore, do not violate the fundamental rights guaranteed by Article 14 or 21 of the Constitution as was sought to be contended on behalf of the petitioners.

12. It was contended that prostitutes and other offenders are all treated alike and even a trafficked prostitute is treated on the same footing as the criminal indulging in trafficking or engaged in prostitution of others. Grievance is made against indiscriminate raids on the houses of the prostitutes and their removal from the houses. The offers to rehabilitate the prostitutes are found to be wanting by them and it was, therefore, vehemently contended on behalf of the petitioners by their learned counsel that, the prostitutes/sex workers of the area should be allowed to stay at the same places and that they could do their prostitution work outside the notified area. The tenor of this plea is suggestive of the unseen forces that work behind the scenes to perpetuate the trade of prostitution that may be more gainful to others than the prostitutes themselves. The stand taken up by the counsel appearing for the respondent authorities all throughout was that rehabilitation efforts are being thwarted by certain vested interests in prostitution industry and the prostitutes are insisting on keeping their "kholis" (rooms) in the notified area from where the illegal activities were being carried on. The insistence of the learned counsel for the petitioners to allow the prostitutes to reside in the same locality amounts to seeking Court's approval to the commission of the offences under the Act. It is pointed out that after actions are taken under the Act, Chakla Bazaar wears a new look and no prostitution activity is now being carried on in the place for the past few months. It is stated that most of the prostitutes who were brought to this place for the trade have gone away and only the middle women (described as "mausies"), 50 to 60 in number, posing to be tenants of the premises, which are small rooms (kholis) have taken up the tirade of being allowed to return to their places. It was submitted that allowing the prostitutes to assemble at the same place would lead to virtual restart of prostitution activities in the notified area. It was, however, stated on behalf of the respondent authorities that no impediment is created against any person occupying his residential premises and only the activities which amount to offences under the Act are targeted by police officers and the authorities.

12.1 This takes us to the examination of the question as to what action the authorised police officer can legitimately take and to what extent victims of trafficking and of persons who are guilty of prostitution of others should be treated differently for the purpose

of their rehabilitation under the provisions of the Act. We have been informed on behalf of the State authorities by the learned counsel appearing for them that the State Government would welcome any direction towards rehabilitation of the prostitutes and to ensure that no undue harassment is caused to them.

12.2 It is significant to note that more stringent punishment is provided (minimum three years and upto 5 years imprisonment) for keeping a brothel, or allowing premises to be used as a brothel under Section 3 of the said Act. In the situations mentioned in sub-section (2-A) of Section 3, a rebuttable presumption arises attributing knowledge against use of premises as a brothel. On conviction of a person, referred in Clause (a) and (b) of sub-section (2) of Section 3, allowing premises to be used as a brothel, the lease or agreement under which such premises are leased or held or occupied at the time of commission of the offence shall be void and inoperative from the date of conviction, as provided by sub-section (3) of Section 3. The Supreme Court in CHITAN J. VASWANI v. STATE OF WEST BENGAL reported in (1975) 2 SCC 829, held in para 10 of the judgment that: "....It is plain from the provisions of sub-section (3) of Section 3 that the consequence of a conviction under Section 3 is the invalidation of the lease of the premises where the brothel is run. The logical consequence must be that the occupier must be thrown out of the prostitutional premises. This is achieved by exercise of the power under Section 18 (2)".(emphasis added). The Court convicting a person for any offence under Section 3 or Section 7 may pass order under sub-section (1) of Section 18 directing eviction of the occupier and attachment, for improper use, of the premises as provided under sub-section (2) thereof. The power of closure of brothel and eviction of offenders from the premises under Section 18 (1) are entrusted to District Magistrate or Sub Division Magistrate (see the Schedule under Section 2 (c) of the Act). While Section 18 is aimed at stopping the use of any premises as a brothel by any person or by prostitutes for carrying on their trade entailing conviction of the occupier and a restriction against letting it out without prior approval of the District/Sub Divisional Magistrate, Section 20 empowers a Magistrate (Metropolitan or Sub Division) removal of a prostitute frequenting any place within the local limits of his jurisdiction and prohibiting re-entry if it is found on inquiry that it is in the interests of general public that such person who is a prostitute should be required to be removed and prohibited from re-entering the same. Sections 18 and 20 are preventive

provisions calculated to "ensure moral hygiene in the locality" which is particularly sensitive. Both the provisions provide for an opportunity of being heard before passing of the orders by the Magistrate of closure, eviction or removal.

13. Removal of persons found by the special police officer or the traffic police officer, as the case may be, from the premises in which such officer carries out search without warrant, when he has reasonable grounds for believing that an offence under the Act has been committed or is being committed in respect of a person living in any premises, is contemplated by sub-section (4) of Section 15 of the Act. The power of search without warrant can be exercised by a special police officer or a traffic police officer only when he has reasonable grounds for believing that an offence punishable under the Act has been or is being committed in respect of a person living in any premises and he is required to ensure that such search is witnessed by two or more witnesses, at least one of whom shall be a woman. The person removed under sub-section (4) of Section 15 is required to be produced before appropriate Magistrate. As an additional safeguard, sub-section (6-A) of section 15 was inserted with effect from 26.1.1987 by which the officer making a search under Section 15 is required to be accompanied by at least two woman police officers and interrogation of a woman or girl who is removed has to be done by a woman police officer and, if not available, to be done only in the presence of a lady member of a recognized welfare institution or organization. The power of search without warrant can be exercised when the search cannot be made without an undue delay. The requirement of reasonable grounds for believing that an offence has been committed or is being committed in respect of a woman or a girl or other person living in such premises is aimed not only at detection of the suspected offences but also at rescuing such woman or girl by removing her from the premises, interrogating her through a woman police officer when required, and forthwith producing her before the Magistrate along with the other persons who are removed. There are sufficient safeguards in Section 15 against any abuse of exercise of the power of search without warrant and this provision is essential for achieving the purposes of the Act. The purposes of the Act are of combating prostitution and immoral trafficking in women and to rescue and rehabilitate the women and girls in respect of whom offences are committed and who are so removed. We hold that Section 15 does not confer any arbitrary power on police officers for any indiscriminate or pointless

search without warrant and the challenge against Section 15 on the ground of violation of Articles 14 and 21 raised on behalf of the petitioners, therefore, fails.

14. The word "prostitution" as defined in Section 2 (f) for the purpose of the Act means sexual exploitation or abuse of persons for commercial purpose and the expression "prostitute" is to be construed accordingly. This would include a woman or a girl who is sexually exploited or abused for commercial purpose. A woman or a girl may subject herself to sexual exploitation or abuse for commercial purposes or there may be other persons, such as, pimps or procurers, or traffickers who subject prostitutes to such sexual exploitation or abuse. Those are persons who sustain themselves on other persons, i.e. women and girls or persons in respect of whom they commit offences, and on whom they and the criminality underlying the immoral traffic, thrives. This is why there are different scales of punishment provided under the Act, the more severe ones under Sections 3 and 4 of the Act being for those who keep or allow premises being used as brothels or live on the earnings of prostitutes. Procuring, inducing or taking women, girls or other persons for the sake of prostitution or inducing such women or girls or persons to carry on prostitution or causing to take them from any place with a view to carry on prostitution or to frequent or become an inmate of a brothel are grave offences for which severe punishment is provided under Section 5. Detaining persons in premises where prostitution is carried on is punishable with imprisonment which may be for life as provided by Section 6. There are presumptions of criminal intent under Sections 3 (2-A), 4 (2) and 6 (3) of the Act against those who allow use of premises as brothels or live on prostitution of other persons, i.e. women or girls, or initiate women and girls or other persons into prostitution. Any person who causes or aids or abets seduction for prostitution of women or girls is liable to be punished for a term of imprisonment which may not be less than seven years but which may be for life under Section 9 of the Act. All these provisions indicate that there is a clear distinction maintained under the said Act between the prostitutes and those who indulge in offences relating to prostitution of women and girls or other persons. There may be prostitutes who are in the trade by themselves and there may be those who are trafficked persons or in respect of whom offences are committed under the Act, coerced by economic and other forces into prostitution from which the stronghold of pimps, procurers and traffickers does not allow them to escape. The provisions of Section 17 (4) of the Act

indicate that the victims of trafficking and offences committed by others under the Act deserve to be rescued and rehabilitated and not punished as criminals.

14.1 The persons removed from the premises in which search is made, when offence punishable under the Act has been or is being committed in respect of a person living in any premises (which would usually include women or girls living in such premises) are required to be produced before appropriate Magistrate and even under Section 16 (1) when the Magistrate directs removal of a person living or carrying on or made to carry on prostitution in a brothel, such person is required to be produced before the Magistrate issuing the order, under Section 16 (2). Persons so removed and produced before the Magistrate under Section 15 (5) or Section 16 (2), are required to be dealt with under Section 17 (4) of the Act when the information is found to be correct and such person is in need of care and protection as contemplated by sub-section (4) (b) of Section 17. The Magistrate acting under Sections 15 (5) and 16 is as per the Schedule to Section 2 (c) of the Act "Metropolitan Magistrate; Judicial Magistrate, First Class; District Magistrate or Sub Divisional Magistrate".

14.2 The above provisions, therefore, clearly call for identifying the victim-prostitutes, girls or other persons, who are trafficked persons or are under the control of pimps and procurers or brothel owners. A failure to correctly identify a trafficked person or a woman or girl or other person in respect of whom offence punishable under the Act is committed, i.e. a victim-prostitute, is likely to result in denial of that person's human rights. It is, therefore, obligatory on the part of the police officer and the magistrate dealing with such cases under the Act to ensure that the trafficked persons, including other victim prostitutes and the traffickers and persons committing offences in respect of prostitutes, including those who are involved in controlling and exploiting trafficked persons and other victim prostitutes are duly identified. The law is required to be strictly enforced against traffickers and those involved in controlling and exploiting prostitutes and committing offences in respect of prostitutes.

14.3 The primary responsibility to ensure safety and immediate well-being of trafficked persons, including victim prostitutes who are controlled and exploited by others in the trade lies heavily with the enforcement authorities and officials. It should be ensured that rescue operations do not further harm the rights and

dignity of the victims of prostitution. India is a party to "Protocol to the United Nations Convention on Transnational Organized Crime to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children", which came into force from 25.12.2003. The Protocol was adopted by the Resolution No.A/RES/55/25 of 15.11.2000 at the 55th Session of the General Assembly of the United Nations. India signed it on 12.12.2002. The purpose of the said Palermo Protocol are:

(a) to prevent and combat trafficking in persons, paying particular attention to women and children;

(b) to protect and assist the victims of such trafficking; and

(c) to promote co-operation among State Parties in order to meet those objectives.

14.4 The word "trafficking" has been defined in the said Protocol under Article 3 as under:

"Article 3
Use of terms
For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) to this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for

the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in sub-paragrapah (a) of this article;

(d) "Child" shall mean any person under eighteen years of age."

14.5 We refer to this Protocol because it was pointed out to us that many of the prostitutes who were working in Chakla Bazaar were Nepalese women and girls. It was stated before us that about 1500 women and girls were working before the raids were started and most of them are now not in that area. Only those staking claims to return to the premises as occupiers are on "dharna" and are refusing the package-offer for rehabilitation as submitted by the learned Assistant Government Pleader on behalf of the respondent authorities before us and as also reflected in the affidavits filed on behalf of the parties. It appears that the number of women and girls working in the notified area far exceeded the number of rooms (kohlis) used for the trade in the area. The element of trafficking and exploitation of women and girls is, therefore, writ large in the very nature of things and the enforcement authorities will do well to identify the victim prostitutes and those who exploit them such as traffickers, pimps, procurers or brothel owners or those running or using premises as brothels. The scheme of the provisions of Sections 15 (5), 16 (2) read with Section 17 (2) and (4) of the Act clearly envisages a humane treatment to the victim prostitutes who are in need of care and protection and who may be detained in a protective home for a period being not less than one year and not more than three years. In the process of discharge of his functions under sub-sections (2) and (4) of Section 17, a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women to assist him as contemplated by sub-section (5) of Section 17. Section 21 provides for establishment of protection homes and corrective institutions under the Act. Therefore, the women and girls in respect of whom offences punishable under the Act are committed in any premises in which they are living and those who were living or made to carry on prostitution in a brothel and are rescued under Section 16, are all required to be dealt with under Section 17 (4) of the Act, where the Magistrate is satisfied about the correctness of information and the need of care and protection, by making an order of detaining them in a protective home. Even a woman or a girl who carried on or is made to carry on prostitution can apply under Section 19 to the Magistrate for being kept in a

protective home or to be provided with care and protection in the manner indicated in sub-section (3) of Section 19 for rehabilitation of such person.

14.6 Thus, far from dealing with all offenders under the Act indiscriminately, the said Act clearly reflects the international concern for human rights, of the victims of trafficking and the prostitutes living in brothels or any premises where offences are committed under the Act in respect of such women and girls. A strong indication of reformative approach comes from Section 10-A of the Act which provides for passing an order of detention in corrective institution for the term indicated thereunder in lieu of sentence of imprisonment when a female offender is found guilty of an offence under Section 7 or Section 8 of the Act and the character, state of health and mental condition of the offender and the circumstances of the case are such that it is expedient that she should be subject to detention for such term and such instructions and discipline as are conducive to her correction. Even though order of detention is to be made by Court in such cases, sub-section (3) of Section 10-A empowers the State Government at any time after the expiration of six months from the date of an order of such detention, if it is satisfied that there is reasonable probability that the offender will lead a useful and industrious life, discharge her from such institution with or without conditions. Matching provisions are made in the Suppression of Immoral Traffic in Women and Girls Rules, 1985 framed under Section 23 of the Act, and Rule 5 thereof provides that where, in pursuance of sub-section (1) of Section 10-A or sub-section (4) of Section 17 or sub-section (3) of Section 19, a Magistrate passes an order directing that a woman or a girl be detained in a protective home or a corrective institution, a warrant of detention in Form II shall be prepared and forwarded to the superintendent of protective home or corrective institution. Under Rule 41, the State Government is required to appoint a Director of Social Defence for all the protective homes and corrective institutions in the State, inter alia, to superintend, supervise and control the working of the Rules. Provisions are made for education and training of inmates of protective homes/corrective institutions (Rule 21), for their daily routine (Rule 22), for their diet (Rule 23), supply of clothes to them (Rule 24), living space for each of them (Rule 25), religious and moral instructions to them by strictly maintaining the principle of secularism (Rule 26), libraries in the protective homes/ corrective institutions (Rule 27), regular medical examination of

the inmates (Rule 12) etc., with a view to achieve the object of rehabilitation of the prostitutes who are the victims of traffickers or of the pimps, procurers or persons using premises as brothels. The prostitutes who commit the offence of prostitution under Section 7 (1) or Section 8 and are not involved in any other offence under the Act, and those in respect of whom offences are committed under the Act and are removed from the premises in which they are living under Section 15 (1) and produced before a Magistrate under Section 15 (5) or those who are rescued and produced before a Magistrate under Section 16 (2) are required to be dealt with keeping in mind the rehabilitation and reformative provisions which are specifically devised for them under Sections 10-A, 17 (4) and 19 (3) read with Section 21 of the Act and Rule 5 of the Rules framed thereunder.

14.7 When premises are used as brothel as defined by Section 2 (a), the offence of keeping a brothel or allowing premises to be used as brothel under Section 3 is committed in respect of the women or girls living in such premises. The offence under section 4 of living on the earnings of prostitution of any woman or girl is committed in respect of such woman or girl living in any premises where such offences are committed. Offence of procuring, inducing or taking woman or girl for the sake of prostitution under Section 5 is committed in respect of such woman or girl, taken or brought to any place where she is made to live for the purpose of prostitution. Offence under Section 6 of detaining a woman or a girl or other person in a brothel or other premises is committed in respect of such woman or girl living in such premises. Offence of seduction of a woman or a girl by any person having the custody, charge or care of or in position of authority over any woman or girl or other person by causing or aiding or abetting seduction for prostitution of such woman or girl or other person is committed in respect of such woman or girl when she is seduced while living in any place from where she is rescued or removed under the provisions of the Act. In all these cases when the offences are committed under the Act in respect of women or girls living in any premises, which are searched, such woman or girl or person in respect of whom such offences are committed and who is not involved in those offences, the proper course for the magisterial Court under Section 17 (4) is to make an inquiry as contemplated therein and, if the information received is found to be correct and the Magistrate is satisfied that the woman or girl or other person in whose respect the offence is committed is in need of care and protection, he may make order of

detention in a protective home and there is no scope for prosecuting such victims of the offences under the Act committed by other persons with respect to them. Therefore, prostitutes living in brothels or other premises in respect of whom offences by others are committed under the Act will, on search, be removed and produced before the Magistrate under Section 17 (4) irrespective of whether such premises are within the notified area or not. However, a prostitute who is involved in any offence, other than mere offence under Sections 7 (1) or Section 8, cannot claim the benefit of Section 17 (4) or Section 10-A of the Act, and has to be tried and punished for those offences in accordance with law.

15. The scheme of the Act and the Rules thus clearly indicates that the victim-prostitutes, i.e. the trafficked persons and women, girls or other persons working as prostitutes under the control of pimps and procurers and those rescued from the premises in which offences are committed in respect of such women or girls, or from brothels as also those persons who are to be kept in protective or corrective detention, are all required to be dealt with by the police officials and other authorities with utmost care and concern in order to ensure that they are properly rescued, kept in safe custody and rehabilitated in accordance with the provisions of the Act and the Rules. It is essential to have a proper monitoring of the rescue and rehabilitation work by the concerned authorities. It was, therefore, suggested by the Court during the course of the arguments that there may be formed by the State Government a State level Rehabilitation Committee and a Local Cell, to start with, for the city and district of Surat, for looking into the legitimate grievances of the affected women and girls who deserve to be rescued and rehabilitated under the Act and the Rules. The State Government has, through the learned Assistant Government Pleader, accepted this suggestion inviting suitable directions in the matter by this Court.

15.1 We may note here that the subject of rescuing and rehabilitating prostitutes has received international attention and principles and guidelines on human rights and human trafficking have been recommended in the report of the United Nations High Commissioner for Human Rights to the Economic and Social Council of the United Nations (E/2002/68 Addl.) placed in the Substantive Session 2002 New York, 1-26 July 2002, on Item No.14 (g) of the Provisional Agenda. The report contains more important recommended principles on human rights and human

trafficking indicating that human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. The States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons. Strategies aimed at preventing trafficking are required to address demand as a root cause of trafficking. States are required to exercise due diligence in identifying and eradicating public sector involvement or complicity in trafficking. All public officials suspected of being involved in trafficking are required to be investigated, tried and, if convicted, appropriately punished. States are required to ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to co-operate in legal proceedings. Children who are victims of trafficking have to be identified as such and their best interests shall be considered paramount at all times. Some of the guidelines recommended on human rights and human trafficking are, promotion and protection of human rights, identification of trafficked persons and traffickers, adoption of effective and realistic anti-trafficking strategies, ensuring an adequate legal framework, ensuring an adequate law enforcement response, protection and support for trafficked persons, prevention of trafficking, special measures for the protection and support of child victims of trafficking, access to remedies of trafficked persons as victims of human rights violations, obligations of civil police etc.

Conclusions and Final order:

16. We, therefore, conclude, declare, direct and hereby order as under:

(i) The provisions of Section 7 (1) (b) of the Immoral Traffic (Prevention) Act, 1956 do not violate Articles 14, 19 (1) (d) (e) (g) or Article 21 of the Constitution of India;

(ii) The notification dated 23.2.2000 issued by the Commissioner of Police, Surat under Section 7 (1) (b) is legal and valid and does not violate any fundamental rights guaranteed by Articles 14, 19 (1) (d) (e) (g) or Article 21 of the Constitution;

(iii) The provisions of Section 14 making any offence punishable under the Act to be deemed to be a cognizable offence and empowering special police officer to make arrest without warrant do not violate Article 14 or Article 21 of the Constitution;

(iv) Section 15 of the Act empowering the special police officer or traffic police officer to make search without warrant does not violate Article 14 or Article 21 of the Constitution;

(v) When a search is made, of the premises in which a woman, girl or other person is living, on the reasonable grounds for believing that an offence punishable under the said Act is committed in respect of such woman or girl or other person and such woman, girl or other person is removed from the premises under Section 15 (4) of the Act, she is required to be forthwith produced before the appropriate Magistrate and is required to be examined by a registered medical practitioner for the purpose of determining her age or for detection of any injuries, as a result of sexual abuse or for the presence of any sexually transmitted diseases under sub-section (5-A) of Section 15 and to be dealt with by the magisterial Court as per the provisions of Section 17 (2), (3), (4) and (5) of the Act for the purpose of safe custody and rehabilitation;

(vi) Even a woman or girl living in a brothel or who is carrying on or being made to carry on prostitution in a brothel and removed therefrom on direction of Magistrate under Section 16 (1) is required to be produced under Section 16 (2) of the Act before the Magistrate issuing the order and is required to be dealt with in accordance with Section 17 (2), (3), (4) and (5) for the purposes of safe custody and rehabilitation;

(vii) The female offender who is found guilty of an offence under Section 7 or Section 8 may be ordered by the Court to be detained in a corrective institution in lieu of sentence of imprisonment in accordance with the provisions of Section 10-A of the Act;

(viii) The provisions of the said Act contemplate identifying the victims of the offences under the

Act committed by other persons and their rescue and rehabilitation in protective homes or corrective institutions and, therefore, the authorised police officers and the appropriate magistrates are required to exercise their functions and duties under the Act in a manner that would achieve the object of the Act of rehabilitation of the women and girls rescued or removed from brothels and other premises;

(ix) Having regard to the statutory provisions authorizing the appropriate magistrate to order detention of prostitutes in protective homes or corrective institutions as contemplated by Sections 10-A, 17 (4) and 19 (3) of the Act read with Rule 5 of the Rules framed thereunder, it is obligatory for the State Government to provide under Section 21 of the Act such number of protective homes and corrective institutions under the Act as are, in its discretion, sufficient and adequate;

(x) For effective supervision and control of the rehabilitation of prostitutes, there shall be constituted by the State a high power State Level Rehabilitation Committee comprising of the following members:

(1) Additional Chief Secretary of the Social Welfare Department as Chairman,

(2) Secretary or Officer of equal rank of the Health Department,

(3) Secretary or Officer of equal rank of the Home Department,

(4) Secretary or Officer of equal rank of the Finance Department and

(5) a Member of State Level Commission for Women or a similar Government Body.

(xi) There will also be constituted by the State Government a Local Cell for the District of Surat having the following members:-

(1) Commissioner of Police or Additional Commissioner of Police, Surat as Chairman;

(2) District Health and Welfare Officer;

(3) Civil Surgeon or a medical officer (The name of Dr.Vikas Desai, in his capacity as the Senior Medical Officer, orally suggested in Court on behalf of the petitioners, may be considered);

(4) A representative of N.G.O. The name of "SAHAS" NGO orally suggested in Court on behalf of the petitioners for representing the case of the members of the petitioner organization, may be considered).

(xii) The State Level Committee for Rehabilitation will get acquainted with the "Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others" and other relevant International Conventions, Declarations, Agreements or Protocols etc. to which India is a Party, and which have a bearing on the suppression of immoral trafficking and rehabilitation of women and girls including the "Protocol to Prevent, Suppress and Punish Traffic in Persons Especially Women and Children" supplementing the "United Nation's Convention against Transnational Organized Crimes" and also the relevant provisions of the said Act and the Rules made thereunder having bearing on the aspects of rescue and rehabilitation of women or girls and children. The State Level Rehabilitation Committee may also get acquainted with the Recommended Principles and Guidelines on Human Rights and Women Trafficking - Report of the United Nation's High Commissioner for Human Rights to the Economic and Social Council of the United Nations (E/2002/68-Addl.).

(xiii) The State Level Rehabilitation Committee will prepare and circulate a note for guidance for all the authorities and officials concerned with such rescue and rehabilitation under the Act. This may be done expeditiously and preferably within three months from the date of this order;

(xiv) The State Level Rehabilitation Committee may be entrusted by the State Government, subject to its ultimate control, power to take and implement its decisions in the matters of rescue and rehabilitation of the women, girls and children

who are required to be dealt with for detention in protective homes and corrective institutions under the provisions of the Act.

(xv) The State Level Rehabilitation Committee will take up the issue of rehabilitation of the prostitutes operating in Chakla Bazaar area of Surat on priority basis, and collect data for identifying cases which are required to be put up before the magisterial courts through authorized police officers for being dealt with under Sections 17 (2) (4), 16 or 19 (3) of the Act and issue directions to subordinate authorities for expeditiously dealing with such cases for the speedy rehabilitation of the women or girls and children affected by the trade of prostitution;

(xvi) The State Level Rehabilitation Committee shall periodically convene, as per its convenience, at least once in two months, to review the progress in the matter of rescue and rehabilitation of the trafficked persons, especially women and children who are required to be rescued and rehabilitated as per the provisions of the said Act and the Rules made thereunder and the international norms reflected in the Conventions, Protocols and Agreements to which India is a party.

(xvii) The State Level Rehabilitation Committee shall consider the recommendations and suggestions of the Local Cell which will study the nature and extent of the offences committed under the Act in the City of Surat and identify the trafficked persons and females and children who are required to be rescued and rehabilitated under the provisions of the said Act and the Rules made thereunder and in consonance with the International Conventions and Protocols etc. to which India is a party and make suggestions or recommendations to the State Level Rehabilitation Committee towards rescue and rehabilitation of such persons;

(xviii) The Local Cell shall periodically check-up the conditions in the protective homes or corrective institutions established under the Act in City and District of Surat, and, if any violation of the Rules relating to maintenance of such homes/institutions are noticed, report them immediately to the State Level Rehabilitation Committee with its suggestions and

recommendations in the matter;

(xix) The Local Cell shall inform, by suitable publications, posters or handbills in the localities involved, the women and girls working as prostitutes, about their right to make application under Section 19 for being kept in a protective home/ corrective institution and also about the facilities available in such homes and institutions under the various provisions of the Suppression of Immoral Traffic in Women and Girls (Gujarat) Rules, 1985, particularly drawing their attention to the provisions showing the facilities that are required to be made available in such homes/institutions, such as medical examination of inmates (Rule 12), daily routine of inmates (Rule 22), diet to inmates (Rule 23), supply of clothes etc. (Rule 24), living space for inmates (Rule 25), religious and moral instructions to inmates (Rule 26), libraries for protective homes/institutions (Rule 27), and similar ameliorative provisions;

(xx) The Local Cell will examine genuine grievances made against police officers and other authorities in writing with sufficient particulars by NGOs or the aggrieved women or girls or other persons involved in prostitution and try to locally sort them out in accordance with law and, if legal aid is called for in any case, refer the same to the appropriate authority under the Legal Service Authorities Act, 1987;

(xxi) The Local Cell may make such suggestions and recommendations as deemed proper for attending to the grievances of affected women or girls or other persons who are victims of prostitution at the hands of other persons, to the State Level Rehabilitation Committee for its consideration and decision;

(xxii) The Local Cell shall be convened periodically, at least once in a month, to consider the aspects of rescue and rehabilitation of the women and girls working as prostitutes and the children affected by the trade, their grievances, and make monthly reports to the State Level Rehabilitation Committee about the action taken by the Local Cell for redressal of genuine grievances and facilitating rescue and rehabilitation of women or girls involved in prostitution and the

children affected by the trade of prostitution under the provisions of the Act and the Rules made thereunder;

(xxiii) The State Level Rehabilitation Committee shall submit its yearly report and recommendations to the Cabinet for its consideration.

Both the petitions stand disposed of accordingly with no order as to costs.

Sd/-
(R.K.Abichandani, J.)
Sd/-
(D.H.Waghela, J.)
(KMG Thilake)